

STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
Land Division  
Honolulu, Hawaii 96813

January 12, 2007

Board of Land and Natural Resources  
State of Hawaii  
Honolulu, Hawaii

PSF No.: 02HD-087

**HAWAII**

Consent to Mortgage and Extension of Lease Term; General Lease No. S-4476, Freddy Nobriga Enterprises, Inc., Lessee; Withdrawal from General Lease No. S-4476; Set Aside to the Department of Land and Natural Resources, Division of Forestry and Wildlife for Forest Reserve, Wildlife Preservation and Related Purposes; and Issuance of Management and Construction Right-of-Entry Permit to the Division of Forestry and Wildlife at Piihonua, South Hilo, Hawaii, Tax Map Key: 3<sup>rd</sup> / 2-6-18: 01

**APPLICANT AND REQUEST:**

Consent to Mortgage from Hawai'i Production Credit Association, Mortgagee, to Freddy Nobriga Enterprises, Inc., in an amount not to exceed \$ 150,000.00.

For Mortgagor to qualify for this mortgage, Mortgagee requires extension of General Lease No. S-4476 of twenty (20) years, commencing on March 1, 2011 and expiring on February 28, 2031 for an aggregate term of 55 years.

Withdraw 1,500 acres from General Lease No. S-4476.

Set aside 1,500 acres to the Department of Land and Natural Resources, Division of Forestry and Wildlife (DOFAW) for forest reserve, wildlife preservation and related purposes

**LEGAL REFERENCE:**

Sections 171-11, 22 and 36(b), Hawaii Revised Statutes, as amended.

**LOCATION AND AREA:**

Government lands situated at Piihonua, South Hilo, Hawaii, identified by Tax Map Key: 3<sup>rd</sup> / 2-6-18: 01, consisting of approximately 5,995 acres, as shown on the attached map labelled Exhibit A.

ZONING:

State Land Use District:     Agriculture  
County of Hawaii CZO:       Agriculture

TRUST LAND STATUS:

Section 5(b) lands of the Hawaii Admission Act  
DHHL 30% entitlement lands pursuant to the Hawaii State Constitution:   NO

PURPOSE OF SET ASIDE:

For forest reserve, wildlife preservation and related purposes.

LEASE CHARACTER OF USE:

Pastoral purposes.

TERM OF LEASE:

Original term of 35-years, commencing on March 1, 1976 and expiring on February 28, 2011.

Requesting an extension of 20-years, commencing on March 1, 2011 and expiring on February 28, 2031.

LEASE ANNUAL RENTAL:

Current rent is \$13,600, due in quarterly installments of \$3,400 on the 1st<sup>h</sup> day of March, June, September and December of each and every year.

LEASE RENTAL REOPENINGS:

Re-openings in the original term were at the end of the 10<sup>th</sup>, 20<sup>th</sup> and 30<sup>th</sup> years of the term. The last rental reopening occurred on March 1, 2006.

Re-openings for the extended term shall be March 1, 2016, and March 1, 2026 (approximately 10<sup>th</sup> & 20<sup>th</sup> year of additional term).

USE OF LOAN PROCEEDS:

1.	Construction of a 3-million gallon reservoir:	\$ 30,000.00
2.	Prepare land and seed 1,500 acres of leased premises:	<u>\$120,000.00</u>
	TOTAL:	<u>\$150,000.00</u>

DCCA VERIFICATION:

Place of business registration confirmed: YES  
Registered business name confirmed: YES  
Applicant in good standing confirmed: YES

CHAPTER 343 - ENVIRONMENTAL ASSESSMENT:

This action before the Board is merely a transfer of management jurisdiction and does not constitute a use of State lands or funds, and therefore, this action is exempt from the provisions of Chapter 343, HRS, relating to environmental impact statements. Inasmuch as the Chapter 343 environmental requirements apply to Applicant's use of the lands, the Applicant shall be responsible for compliance with Chapter 343, HRS, as amended.

APPLICANT REQUIREMENTS:

General Lease No. S-4476:

- 1) All trucks and equipment located at the entrance to the ranch shall be promptly removed from the forest reserve area; and
- 2) All cattle in the vicinity of the Saddle House area shall be removed.
- 3) Shall be responsible for the repair and maintenance of the newly constructed boundary fence lines of the areas withdrawn as constructed by DOFAW.

DOFAW:

1. Process and obtain subdivision at Applicant's own cost;
2. Provide survey maps and descriptions according to State DAGS standards and at Applicant's own cost; and
3. Shall be responsible for the fencing of the withdrawn area at its own cost.

BACKGROUND:

General Lease No. S-4476, a 35-year pasture lease was awarded through a public auction on August 28, 1975 to Mr. Richard Smart with a successful bid of \$65,100. Two scheduled rental re-openings have since re-established the annual rental at \$13,600, which is more in line with the property's fair market value. The lease was subsequently assigned to Alfred J. Nobriga on May 8, 1987, then from Alfred J. Nobriga to Freddy Nobriga Enterprises, Inc. on March 3, 1989.

The Board consented to three prior mortgages between Freddy Nobriga Enterprises and the Hawaii Production Credit Association upon the demised premises, totaling \$676,930. According to the Hawaii's Production Credit Association, Nobriga Enterprises has repaid all three mortgages as agreed.

In addition to the subject mortgage loans, the Lessee also has an established \$300,000 line of credit with the Hawai'i Production Credit Association as another source of funds. However, funds drawn from the line of credit and expended on the demised premises would not be an encumbrance on the leasehold property.

A Stand By Letter of Credit with the Hawai'i Production Credit Association for \$29,250.00 is on file, with an expiration of February 1, 2007.

By letter dated April 16, 2001, Mr. Alfred J. Nobriga, President of Freddy Nobriga Enterprises, Inc., requested consent to mortgage with a 20-year lease extension of General Lease No. S-4476. Purposes for the consent to mortgage and lease term extension is to allow Nobriga Enterprises to secure financing from the Hawai'i Production Credit Association, for the construction of a 3-million gallon reservoir and planting of grass seeds on 1,500 acres on the demised premises. Delays in submitting a recommendation of the subject request was due to ongoing issues between Freddy Nobriga Enterprises and the Division of Forestry and Wildlife (DOFAW), concerning cattle encroachments onto the abutting forest reserves.

Upon soliciting comments from DOFAW regarding a proposal to granting of a lease term extension, DOFAW indicated that it could not support such a request until the various cattle incursion issues are resolved.

#### DISCUSSION:

Over the years, DOFAW claims it has communicated on numerous occasions with Mr. Nobriga about the cattle's incursion into the abutting forest reserve, but that the incursions have continued. Nobriga Enterprises had failed to comply with DOFAW's repeated demands to keep his stray cattle out of the adjacent forest reserves. This situation leaves DOFAW with no other options except to initiate a cattle eradication plan to protect the forest reserve and its resources.

Mr. Nobriga, on the other hand, claims that DOFAW is negligent in its responsibility to properly maintain and remove those trees along the boundaries of the forest reserve that often drop its limbs onto the adjacent demised premises and destroying that portion of the fence. As a result, his cattle are given an opportunity and have entered the forest reserve by way of the damaged fence line. Mr. Nobriga wants DOFAW to clear a buffer between the forest reserve and the leasehold property boundary to prevent fallen tree limbs from damaging the fence lines. DOFAW maintains that it is not willing to bulldoze miles of forest reserve land, which is located within the Conservation District. On April 20, 2001, Alfred J. Nobriga, Plaintiff, under Civil No. 01-1-0217, filed a Complaint For Declaratory Relief (Order) in an attempt to postpone cattle eradication efforts exercised by DOFAW in ridding the forest reserve of stray cattle. The Order was later dismissed without prejudice on July 5, 2003, as there were not sufficient grounds to warrant execution of the Order.

At its meeting of May 24, 2002, under agenda Item D-24, the Board of Land and Natural Resources deferred its action on a request for a consent to mortgage with lease term extension of General Lease No. S-4476. The Board indicated that they wanted the Civil Case and all issues resolved prior to considering an extension of the lease. Staff is of the understanding that Mr. Nobriga dropped the court case mainly due to his desire to pursue the extension of lease.

It should be noted that the lease requires that the entire perimeter of the leased premises be fenced with stock proof fencing and the lessee is responsible for maintenance. However, staff feels it would be questionable for the State to attempt to enforce such a condition in the last five years of the lease after not having enforced the condition for the prior 30 years of the lease term. Additionally, it would not be in the State's best interest since forcing such fencing would necessitate bulldozing of natural lava areas and portions of pristine forest adjacent to existing forest reserve. Part of the confusion over boundaries and fencing stemmed from the fact that the former lease (GLS-2786) to W.H. Shipman, Ltd. included a larger area and the State adjusted the boundaries thereby reducing the lease area prior to issuing the current lease by way of a public auction. The former lease also utilized natural lava flows, ravines, gulches, and riverbeds as natural barriers in lieu of stock-proof fencing. The current lessee assumed that he had the same leased area as the former lease and failed to adjust the boundary fencing accordingly.

Land Division staff required the lessee to repair all existing fencing to an acceptable condition prior to any consideration of an extension. Lessee has done significant repair work on the fencing but there remains some unresolved boundary fencing issues along the northern boundary. The majority of the northern boundary of the leased premises is a gulch that is being used as a natural barrier with no fencing. Current conservation practices require that cattle be fenced out of gulches and staff is recommending that the lessee obtain an updated conservation plan and fence the northern boundary consistent with current conservation practices. Staff is recommending that a portion of the funds obtained from the mortgage also be used for the purposes of fencing this northern boundary with an acceptable buffer as determined by an acceptable conservation plan.

Over the last two years, staff from both Land Division and DOFAW has been in frequent negotiations with the lessee with regard to the extension of lease and the unresolved fencing issues. As a result of these negotiations, there is tentative agreement on a proposal to withdraw approximately 1,500 acres of the existing 5,995 acres leaving an area of approximately 4,595 acres. The majority of the 1,500 acres is marginal grazing lands and mainly broken pahoe-hoe lava. The area has stands of existing Koa and grasses that would enhance DOFAW's programs for the Nene. The withdrawal will also provide road accesses deeper into the Hilo Forest Reserve providing for better access to hunters and better management of ungulate and wild cattle populations within the forest reserve. DOFAW is agreeable with this concept and would not object to the granting of the allowable lease extension with this withdrawal. The remaining acreage in the lease will be mainly those areas of ash and soil that is heavily covered in productive grazing grasses.

DOFAW indicates that they would be able to obtain the necessary funding and resources needed to fence the withdrawn area. DOFAW will be responsible for working with DAGS Survey Division on the subdivision of the withdrawn area from the lease and consolidation with the Hilo Forest Reserve. Although there was initially some confusion over the exact location of the boundaries of the withdrawn area, both DOFAW and the Lessee have since resolved their differences and have agreed on a boundary alignment.

As provided in General Lease No. S-4476 (Page 3a, Paragraph 3), the Lessor reserves the right to withdraw all or any portion of the demised land for any public purpose. The Lessee will be entitled to compensation for those improvements made by the Lessee, which have been approved by the Lessor, on any land withdrawn, in an amount equal to the fair market value. That the Board will give reasonable notice to the Lessee prior to any withdrawal. If only a portion of the demised land is withdrawn, the rent for the remaining portion will be reduced in proportion to the rental value of the land withdrawn.

#### LEASE COMPLIANCE:

Due to the recent rental reopening conducted on March 1, 2006, staff is recommending that the valuation for the immediate rental reopening remain unchanged. Staff appraiser was consulted on the matter and has indicated that it is safe to use the same valuation, as pasture rents are historically relatively stable.

Freddy Nobriga Enterprises, Inc. has not had a lease, permit, easement or other disposition of State lands terminated within the last five years due to non-compliance with such terms and conditions.

Staff reviewed the file and can report that for the past two (2) years, Lessee had no Notices of Default. Liability insurance is current, with expiration on January 26, 2007. Fire insurance is not required. Lessee has never been cited for any other illegal or unlawful activity on the State property. There is no outstanding rental reopening issues.

#### REQUEST FOR COMMENTS:

Various governmental agencies were solicited for comments. All respondents had no objections or comments to offer relating to the proposed set aside as indicated below:

AGENCIES	COMMENTS
<b>County of Hawai'i</b>	
Parks & Recreation	No objections
Planning	No objections
Public Works	No comments
<b>State of Hawai'i</b>	
DHHL	No response

DLNR- Aquatic Resource	No objections
DLNR-DOCARE	No response
DLNR- Historic Preservation	No response
DLNR- Na Ala Hele	No response
DLNR- OCCL	No response
DLNR- Parks	No objections
<b>Other:</b>	
Office of Hawaiian Affairs	No objections
Freddy Nobriga Enterprises	No objections

**SUMMARY:**

Through collaborative efforts, DOFAW and Freddy Nobriga Enterprises agree that the most feasible solution to all the issues and problems experienced would be to withdraw approximately 1,500 acres of the leased area to be set aside to DOFAW as an addition to the Hilo Forest Reserve. That the withdrawn section would primarily consist of the lava flows, the forested areas, the graveled access road, and the marginal pasturelands. DOFAW is willing to fence off the realigned south and east property boundary of the leasehold property at its own cost. That the proposed alignment would instantaneously create a 100-foot wide treeless buffer between the actual forest and the leased area. Staff is of the understanding that DOFAW and Freddy Nobriga Enterprises are in agreement on the proposed boundary alignment for the areas withdrawn.

The leased area is also being invaded with noxious weeds, specifically Gorse and Fire Grass. Staff is recommending a condition in the extension that the Lessee be required to include a plan to address noxious weeds within the Conservation Plan for the remaining leased area and take immediate and more aggressive action to eradicate or control the spread of the Gorse and Fire Grass upon the demised premises.

Further, that Freddy Nobriga Enterprises, Inc., shall remove and properly dispose all abandoned and/or discarded vehicles, equipment, and unnamed man-made materials from the leased area within sixty (60) days from date of this action.

**RECOMMENDATION:**

That the Board, subject to the Applicant fulfilling the Applicant requirements listed above:

1. Consent to the mortgage between Freddy Nobriga Enterprises, Inc., Mortgagor, and Hawaii Production Credit Association, Mortgagee, subject to the following:

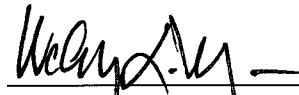
- A. The loan proceeds shall be used for the purposes as stated in "Use of Loan Proceeds" above. Lessee may also utilize loan proceeds for fencing of the northern boundary along existing unfenced gulch areas and the required noxious weed control plan. The Lessee shall maintain records of loan expenditures, which may be inspected by the Department;
  - B. The standard terms and conditions of the most current consent to mortgage form, as may be amended from time to time;
  - C. Review and approval by the Department of the Attorney General; and
  - D. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.
2. Authorize the extension of General Lease No. S-4476 under the terms and conditions cited above, which are by this reference incorporated herein and further subject to the following:
- A. The standard terms and conditions of the most current lease extension form, as may be amended from time to time;
  - B. The Lessee shall remove all abandoned and inoperable cars, trucks, buses and other equipment from the leased area and forest reserve areas within 60 days of this Board action;
  - C. That the Board accept and authorize the use of its March 2006 rental reopening valuation as the immediate rental reopening value for this request;
  - D. The Lessee shall incorporate a noxious weed program for Gorse and Fire Grass into it's Conservation Plan and agrees to commence immediate and aggressive action to eradicate and/or control the spread of Gorse and Fire Grass upon the leased area;
  - E. The Lessee shall construct, replace, repair, and/or reinforce the fence lines along its northern boundary to effectively restrict cattle from entering the ravines, gulches and riverbeds of the leased area perimeter;
  - F. Lessee agrees to be responsible for the maintenance and repair of the boundary fence lines to be newly constructed and paid for by DOFAW, along the withdrawn section of the leased area;
  - G. Review and approval by the Department of the Attorney General; and
  - H. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interest of the State.



3. Authorize the withdrawal of approximately 1,500 acres from General Lease No. S-4476, subject to the following:
  - A. Upon withdrawal, rents under General Lease No. S-4476 shall be reduced in proportion to the area of the premises withdrawn;
  - B. The Division of Forestry and Wildlife shall be responsible for the survey of the proposed boundary alignment for the withdrawn area;
  - C. The Division of Forestry and Wildlife shall be responsible for the fencing of the withdrawn area at its own cost along the agreed alignment;
  - D. The Division of Forestry and Wildlife shall be responsible for processing and obtaining subdivision;
  - E. Review and approval by the Department of the Attorney General; and
  - F. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interest of the State.
4. Approve of and recommend to the Governor the issuance of an executive order setting aside the subject lands to the Department of Land and Natural Resources, Division of Forestry and Wildlife under the terms and conditions cited above, which are by this reference incorporated herein and subject further to the following:
  - A. The standard terms and conditions of the most current executive order form, as may be amended from time to time;
  - B. Disapproval by the Legislature by two-thirds vote of either the House of Representatives or the Senate or by a majority vote by both in any regular or special session next following the date of the setting aside;
  - C. Review and approval by the Department of the Attorney General; and
  - D. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.
5. Authorize the issuance of a management and construction right-of-entry to the Division of Forestry and Wildlife for forest reserve, wildlife preservation, and other related purposes, under the terms and conditions mentioned above, which by this reference incorporated herein and subject further to the following:
  - A. The standard terms and conditions of the most current management and construction right-of-entry form as may be amended from time to time;

- B. The term of this management and construction right-of-entry shall commence upon execution of the withdrawal document and shall expire upon the issuance of the set aside document;
- C. The Division of Forestry and Wildlife shall be responsible for the survey of the proposed boundary alignment for the withdrawn area, at its own cost;
- D. The Division of Forestry and Wildlife shall be responsible for the fencing of the withdrawn area at its own cost;
- E. The Division of Forestry and Wildlife shall be responsible for compliance with Chapter 343, Hawaii Revised Statutes, as amended, prior to commencement of any work activity; and
- F. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interest of the State.

Respectfully Submitted,



Wesley T. Matsunaga  
Acting District Land Agent

APPROVED FOR SUBMITTAL:



PETER T. YOUNG, Chairperson



